

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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In the Matter of

Nondiscrimination in the Distribution of
Interactive Television Services Over Cable

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CS Docket No. 01-7

To: The Commission

REPLY COMMENTS OF CHARTER COMMUNICATIONS, INC.

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REPLY COMMENTS OF CHARTER COMMUNICATIONS, INC.

Pursuant to the Commission's Notice of Inquiry ("NOI") in the above-captioned proceeding, Charter Communications, Inc. ("Charter") hereby submits its Reply Comments regarding the distribution of Interactive Television ("ITV") over cable television systems.

I. INTRODUCTION AND SUMMARY

It is unlikely the Commission has ever conducted a proceeding in which the record so clearly established that it is not time to regulate. The comments in this NOI make it painfully obvious that regulatory intervention in the ITV marketplace it is not only unnecessary but potentially damaging to the development of ITV services over cable systems. Charter will, therefore, keep its reply comments appropriately brief.

It is rare to find virtually all parties in a Commission NOI proceeding in agreement on the fundamental factual matters related to the Inquiry. However, in this NOI, there is consensus on

the following critical facts: No one knows when or how ITV services or products will develop or be implemented. No one knows what services will succeed or how long such success will take. No one knows who will develop those successful ITV services. No one knows which distribution facilities will be most successful in the delivery of ITV services. Finally, no one knows of any cable operator behavior that has in any way harmed or slowed the development or offering of ITV services. To even contemplate government regulation in these circumstances is untenable. As Chairman Powell recently noted: "To me, that's when government often is at its worst – when it's trying to regulate phantoms, you know, straw men, about what might happen as opposed to what is happening."¹

II. ITV REGULATION IS PREMATURE

In addition to the parties' agreement that ITV is at an infant stage of development, it was also recognized that the ITV marketplace is a financially precarious one. Multichannel News reported the following recently: "Reality set in for workers at interactive-television companies last week, as a drain in the capital markets, slow deployments and a stock-market slide sparked dozens of layoffs at several players in the sector."² Any suggestion of government intervention in this ITV marketplace could further undermine investment and deployment of ITV facilities and services. In its comments, OpenTV, Inc., a provider of software and integration services for digital interactive television, stated: "Regulation may create uncertainty and suppress investment, defeating the nearly universal goal of diversity in networks, content, and services."³

¹ "For Powell, ITV Regs Loom Low," *Multichannel News*, April 9, 2001, p. 47.

² "Interactive Layoffs," *Multichannel News*, April 9, 2001, p. 1.

³ OpenTV Comments at 1-2.

Additionally, Canal+ Technologies, a global technology provider for interactive television, stated:

Finally, Canal+ Technologies believes that the Commission should not implement regulations regarding ITV at this time. While the ITV industry is developing both from a technological and business standpoint, the Commission should allow market forces, and the interaction and cooperation between industry players, to facilitate the growth of a burgeoning and exciting new technology.⁴

As Charter noted in its initial comments, numerous other vendors of ITV technology and equipment have voiced their concern that this NOI could potentially slow investment and deployment of ITV facilities and services.⁵

The comments also confirm that because the boundaries of ITV services and technologies have not yet taken shape, cable operators are still in the developmental and, in many cases, experimental stages of ITV services deployment, provisioning and customer support. In its initial comments, Charter identified the engineering challenges that face cable operators in the deployment of ITV services.⁶ Specifically, Charter noted that because the cable system architecture does not have individual customer dedicated lines, the programming and data routed over a cable system's shared bandwidth must be carefully managed to ensure adequate capacity and proper routing for both upstream and downstream transmissions.⁷ In its comments, Cablevision Systems Corporation also addressed these deployment issues:

Every link in the interdependent chain of technology, from the headend equipment, network infrastructure and signal transport facilities to software, applications, and content must function properly in order for ITV to have even a chance of winning subscribers.⁸

⁴ Canal+ Technologies Comments at 3.

⁵ Charter Comments at 3.

⁶ Charter Comments at 8-9.

⁷ Charter Comments at 8.

⁸ Cablevision Systems Corporation Comments at 2-3.

Commission regulation of ITV services provided over cable systems has the potential to not only halt, but reverse the progress that has been made to date by cable operator engineers in the challenge to deploy, provision and support the various ITV services.

III. THE ITV MARKET IS WORKING

The comments establish not only is there no trend or pattern of cable operator behavior favoring affiliates in the ITV marketplace, but there is not even a single instance of such affiliate-favored activity identified. To the contrary, ITV technology and software providers, OpenTV and Canal+ Technologies, find the marketplace is working well and that it is vastly preferable to government intervention.⁹ Specifically, OpenTV concludes:

OpenTV recommends avoiding regulation of iTV in the absence of specific harm to consumers. A clear statement to this effect, issued by the Commission and maintained without change, will reduce uncertainty and prompt the investment that delivers diversity in networks, content, and services.¹⁰

Further, in joint comments filed by programmers, both affiliated and unaffiliated with cable operators, it is noted that the ITV marketplace is currently working:

To the extent that relationships have been formed in the ITV market, there is no evidence to date of discrimination or dominance by any one player or group of players. There are numerous entities providing various ITV services to both affiliated and unaffiliated distributors. Cable operators have entered into agreements with unaffiliated ITV service providers. All indications thus far point toward more entrants providing new interactive services – not a “monopoly” of a few cable-owned ITV providers distributing services on affiliated cable systems and offering interactive services to their affiliated programming networks. In this environment, there is no present need to impose non-discrimination obligations on cable operators or affiliated entities that provide ITV services when there is no current evidence of discrimination.¹¹

⁹ OpenTV Comments at 16-20; Canal+ Technologies Comments at 1-5, 27-31.

¹⁰ OpenTV Comments at 21.

¹¹ Joint Comments of the Golf Channel, Outdoor Life Network, SpeedVision Network, and The Weather Channel at 13.

Given the record that has been established in this NOI, including the comments of entities unaffiliated with cable operators, it is impossible to conclude that there is any discriminatory conduct in the ITV marketplace that is having a harmful affect on the development and deployment of ITV services.

In just the past three months, Charter has announced two major ITV deployment agreements – **both with unaffiliated providers**. First, Charter agreed to a ten-year interactive program guide agreement with Gemstar-TV Guide. Thus, Gemstar will be providing interactive TV Guide services to a large number of Charter subscribers – even though Charter is affiliated with WorldGate Communications, another provider of such interactive guide services.¹²

Additionally, last month, Charter entered into a major agreement with interactive software application provider, Liberate Technologies. The Liberate software will allow Charter to provide several different interactive applications including video on demand, interactive television guides, and a wide variety of Internet services. As with Gemstar, Liberate is not affiliated with Charter. In a developing and competitive ITV marketplace, it is performance and customer satisfaction that drives agreements and deployment, not government regulation.

IV. REGULATING CABLE OPERATOR ITV ACCESS WOULD VIOLATE THE FIRST AMENDMENT

As discussed above, the NOI comments establish that there is no pattern or even an isolated incident of discriminatory behavior in the ITV market by cable operators based upon affiliation. Given the lack of any harm to consumers or the marketplace, the imposition of the NOI's proposed nondiscriminatory ITV access requirements would blatantly violate the First Amendment.

For the most part, the proponents of Commission ITV access regulation failed entirely to address the First Amendment barriers to such regulation. As Charter, NCTA and several other cable companies pointed out in their comments,¹³ government may infringe upon a cable operator's editorial control over its distribution capacity only where there is "substantial evidence"¹⁴ of a "substantial government interest that would be achieved less effectively absent the regulation."¹⁵ Given there is no evidence of anticompetitive behavior or harm to the ITV marketplace, Commission regulation of ITV cable system access is constitutionally prohibited. As the U.S. Court of Appeals for the District of Columbia recently held, the Commission cannot limit a cable operator's right to control cable system services and distribution based on a purely conjectural risk of anticompetitive behavior.¹⁶

The First Amendment implications of imposing mandatory "non-discriminatory access" upon a cable operator were recently addressed by a federal district court in Florida. Specifically, the Court struck down Broward County's internet service "open access" ordinance as a direct violation of the cable operator's First Amendment rights.¹⁷ In a finding that is remarkably applicable to the regulatory approach contemplated by the NOI, the court found:

The imposition of an equal access provision by operation by the Broward County ordinance both deprives the cable operator of editorial discretion over its programming and harms its ability to market and finance its service, thereby curtailing the flow of information to the public. It distorts and disrupts the integrity of the information market by interfering with the ability of market participants to use different cost structures and economic approaches based upon the inherent advantages and disadvantages of their respective technology.¹⁸

¹² "Gemstar Guides Charter To Sign 10-Year IPG Deal," Multichannel News, February 26, 2001.

¹³ Charter Comments at 9-12; NCTA Comments at 49-54; AT&T Comments at 38-39; Comcast Comments at 10-13.

¹⁴ *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994).

¹⁵ *Id.* at 662.

¹⁶ *Time Warner Entertainment Co. L.P. v. FCC*, 2001 U.S. App. LEXIS 3102 (D.C. Cir. Mar. 2, 2001).

¹⁷ *Comcast v. Broward County*, 124 F. Supp. 2d 685 (S.D. Fla. 2000).

¹⁸ *Id.* at 693.

The Commission's imposition of non-discriminatory constitutional ITV access would suffer from the same failings as identified by the *Broward* federal court. Simply stated, the ITV access regulation contemplated by the NOI will violate the First Amendment.

V. **CONCLUSION**

Based upon both the foregoing and our initial comments, the Commission should terminate the NOI with a clear statement that no regulation is necessary or contemplated at this time.

Respectfully submitted,



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May 11, 2001

CERTIFICATE OF SERVICE

I, Paulette Humphries, hereby certify that I have this 11th day of May, 2001, caused a copy of the foregoing Reply Comments of Charter Communications, Inc. to be delivered by courier to the following:

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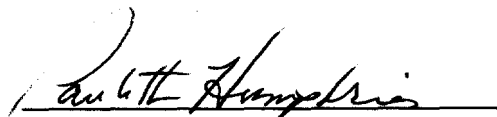
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